

UNITED STATES
v.
GRAHAM KEITH WARD

IBLA 79-301

Decided October 29, 1979

Appeal from decision of Administrative Law Judge Dean F. Ratzman rejecting application to purchase T&M site A-063963 and cancelling the entry.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Alaska: Trade and Manufacturing Sites

In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he used, occupied, and improved the site for trade, manufacture, or other productive industry.

2. Alaska: Trade and Manufacturing Sites

A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the site. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere preparation for a prospective business is not sufficient under the statute.

APPEARANCES: Dan A. Hensley, Esq., Duncan, Brown, Weinberg & Palmer, Anchorage, Alaska, for appellant; Francis Neville, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Graham Keith Ward appeals from the decision of Administrative Law Judge Dean F. Ratzman, dated March 5, 1979, rejecting his application to purchase trade and manufacturing site (T&M) A 063963, and canceling the entry. On November 15, 1965, Ward had filed notice of location for 80 acres of unsurveyed public land along the Tolsana River near Glenallen, Alaska, for use as a T&M site pursuant to 43 U.S.C. § 687a (1976). ^{1/} He stated he intended to use the land for a cafe and campground with hot water and laundry facilities. On November 16, 1970, at the conclusion of the 5-year statutory life of the claim, Ward filed an application to purchase 60 acres of the T&M site, indicating the land had been improved and used for campground and recreation purposes.

^{1/} In 43 U.S.C. § 687a (1976) it is provided:

"Any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory authorized on May 14, 1898, by law to hold lands in the Territories, thereafter in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at \$2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *."

Further, 43 U.S.C. § 687a-1 (1976) states in part that "[a]pplication to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the Notice of Claim under this section."

The implementing regulations have fleshed out the specific requirements of proof intended by the statutes. Under 43 CFR 2562.3(d)(1), an applicant must show:

"That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the Act of May 14, 1898 (30 Stat. 413; 43 U.S.C. 687a.) [Emphasis supplied.]

43 U.S.C. § 687a (1976) has been repealed effective October 21, 1986, Federal Land Policy and Management Act of 1976, P.L. 94-579, section 703(a), 90 Stat. 2789.

On December 19, 1977, the Alaska State Office, Bureau of Land Management, issued a complaint charging

a. Section 10 of the act of May 14, 1898 (30 Stat. 413, as amended; 43 U.S.C. sec. 687a) and the regulations issued thereunder, specifically section 2562.3(d)(1), Title 43, Code of Federal Regulations, require that the land be actually used and occupied for the purpose of trade, manufacture, or other productive industry. The contestee was not actually using and occupying the land for the purpose of trade, manufacture, or other productive industry within the meaning of the trade and manufacturing site law during the life of the claim or at the time application to purchase was filed on November 17, 1970.

b. Section 10 of the act of May 14, 1898 (30 Stat. 413, as amended; 43 U.S.C. 687a), and the regulations issued thereunder, specifically section 2562.3(d)(1), Title 43, Code of Federal Regulations, prohibit the acquisition of a site for a prospective business. Contestee is attempting to acquire the land for a prospective recreational, picnic and camping area.

c. The settlement laws for public land, specifically the trade and manufacturing site law, as set forth in section 20 of the act of May 14, 1898 (30 Stat. 413), require, among other things, that any person applying to enter lands must file an affidavit that the application is honestly, and in good faith, made for the purpose of occupying the land for trade and manufacturing. The contestee failed to make a good faith attempt to prove up on his claim in the manner required by the Federal land laws and in section 2562.0-3, Title 43, Code of Federal Regulations.

Ward denied the charges, and the matter was heard before Administrative Law Judge Ratzman at Anchorage, Alaska, on July 20, 1978.

Following receipt of evidence and testimony, the Judge issued his decision rejecting the application to purchase and cancelling the entry. The decision sets forth succinctly and accurately the salient facts of the case and the applicable law. A copy of the decision is attached hereto as Appendix A.

[1] Appellant contends it was error for the Judge to rely so heavily on the testimony of the Government's witness, who stated, in his view, there was no substantial use of the T&M site between 1965 and 1970 because he found no substantial disturbance of the vegetation, damage to the trees, or accumulation of litter. Appellant pointed out that the Government's witness had not been on the site

prior to 1976, and that his observations were based only on inference. In a contest proceeding the Government has the burden of establishing a prima facie case of noncompliance with the requirements for trade and manufacturing, and headquarters sites. The burden then shifts to the applicant to show by a preponderance of the evidence that he has used, occupied, and improved the sites for trade, manufacture, or other productive industry. United States v. Jack Zemmy Boyd, Jr., 39 IBLA 321 (1979).

The testimony of the Government's witness did establish a prima facie case of noncompliance by appellant, and it was thus necessary for him to show by a preponderance of the evidence that he had complied with the statutory requirements. The testimony and evidence from the appellant was to the effect that he had not been in business on the T&M site prior to June 1970 and that the total receipts from the campground activity was not more than \$48 from June to November 1970. Appellant stated his principal occupation is teaching school and that the idea of a campground to augment his income seemed good to him, especially as tourism was expected to surge in Alaska, and a State campground nearby seemed not adequate to handle the expected business. During the 5-year life of his claim, appellant apparently spent most of his time away from Alaska in pursuit of his teaching career, so that he was unable to develop his T&M site as planned.

Accepting without question all the testimony and evidence from the appellant, it must be held that he has not shown by a preponderance of the evidence that he used, occupied, and improved the site for trade, manufacture, or other productive industry.

Appellant further contends it was error for the Judge to find that he was attempting to acquire the T&M site for prospective business. Appellant concedes he operated his campground at a loss during the "prove-up" period from 1965 to 1970, and for several years thereafter. He suggests that "a modest operation or even an unprofitable one * * * must be considered as an actual business operation if there is evidence of activity of such a nature that a reasonable return could be expected from the operation," adverting to United States v. Ronald B. Tippetts, 29 IBLA 348 (1977); Hershel E. Crutchfield, A-30876 (September 30, 1968); James E. Allen, A-30085 (February 23, 1965).

It is correct that the cited decisions state substantially the quoted language, but following the quoted portion, each decision substantially holds that "the law cannot be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as the business operated by appellant during the statutory life of his claim."

[2] As the record demonstrated a paucity of actual business on the T&M site during the statutory life and for several years thereafter, we must agree with the Judge that appellant is trying to acquire the site for prospective business. A claimant of a trade and manufacturing site must show that at the time of filing his application to purchase he was engaged in trade, manufacture, or other productive industry in connection with the sites. While it is not necessary for the claimant to show that all functions of the business were carried on at the site, he must show a bona fide commercial enterprise from which he reasonably hoped to derive a profit; mere preparation for a prospective business is not sufficient under the regulations. United States v. Boyd, supra.

We cannot agree with the contention of appellant that the delay in initiating a contest against this T&M site was detrimental to appellant's cause. By his own admissions, he had not established a qualifying profitable enterprise on the site during the statutory life of the claim, a situation that would not have been different at any earlier hearing on the matter.

After our full review of the entire case record, we find the Judge correctly applied the applicable law to the facts of this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result, however I would not hold that appellant is preparing for a prospective business. The site herein is an area annually flooded, where improvements will be regularly destroyed. Appellant has not shown what revenues were derived from the site itself during the qualifying period. I would hold he has not proven a bona fide commercial enterprise from which he reasonably hoped to derive a profit -- either at present or prospectively.

As to the Board's approach to estoppel, set forth in the cases cited by the Administrative Law Judge, there has been a recent modification in Edward L. Ellis, 42 IBLA 66, 69 (1979).

Joseph W. Goss
Administrative Judge

March 5, 1979

United States of America,	:	<u>Contest No. A-063963</u>
	:	
Contestant	:	Trade and Manufacturing Site
	:	
v.	:	
	:	
Graham Keith Ward,	:	
	:	
Contestee	:	

DECISION

Appearances: Dan A. Hensley, Attorney, Anchorage, Alaska, for
the Contestee.

Francis Neville, Attorney, Office of the Solicitor,
United States Department of the Interior, Anchorage,
Alaska.

Before: Administrative Law Judge Ratzman.

The Alaska State Office of the Bureau of Land Management, Department of the interior, issued a complaint on December 19, 1977, contesting an Alaska Trade and Manufacturing application filed by Graham Keith Ward. The following charges are made in the complaint:

1. Section 10 of the Act of May, 1898 (30 stat. 413, as amended, 43 U.S.C. Sec. 687a) and the regulations issued thereunder, specifically section 2562.3(d)(1), Title 43, Code of Federal Regulations, require that the land be actually used and occupied for the purpose of trade, manufacture, or other productive industry. The contestee was not actually using and occupying the land for the purpose of trade, manufacture, or other productive industry within the meaning of the trade and manufacturing site law during the life of the claim or at the time application to purchase was filed on November 17, 1970.

2. Section 10 of the act of May 14, 1898 (30 Stat. 413, as amended; 43 U.S.C. 687a), and the regulations issued thereunder, specifically section 2562.3(d) (1), Title 43, Code of Federal Regulations, prohibit the acquisition of a site for a prospective business. Contestee is attempting to acquire the land for a prospective recreational, picnic and camping area.

3. The settlement laws for public land, specifically the trade and manufacturing site law, as set forth in section 20 of the act of May 14, 1898 (30 Stat. 411), require, among other things, that any person applying to enter lands must file an affidavit that the application is honestly, and in good faith, made for the purpose of occupying the land for trade and manufacturing. The contestee failed to make a good faith attempt to prove up on his claim in the manner required by the Federal land laws and in Section 2562.0-3, Title 43, Code of Federal Regulations.

The contestee filed an answer on January 20, 1978 denying the allegations in the complaint. A hearing was held on July 20, 1978 in Anchorage, Alaska. A Notice of Location for the lands in dispute, filed on November 19, 1965, claimed use for a cafe and campground. The 80 acre site is in the Tolsona Creek Valley approximately one-half mile from the Glenn Highway, in the Chitina Recording District, Alaska.

At the hearing Mr. Ward was called as an adverse witness by the contestant. He is a school teacher and campground operator. He described the Trade and Manufacturing site as a rectangular plot 1/2 mile long and 1/4 mile wide extending from bluff to bluff in the Tolsona Creek Valley. It is adjacent to a homestead owned by Mr. Ward. Tr. 5. The following improvements were listed on his application to purchase. (Ex. 2):

- 1 mile road - \$1,200
- 9 campsites at \$25 - \$225
- 1 12 x 16 log pavilion
- 2 outhouses at \$50 - \$100
- 1/2 mile trail including log bridges
- General clearing and firewood cutting

Mr. Ward contends that the improvements he made covered 60 acres of the site. Tr. 6, Ex. 2. He included an additional 20 acres as a buffer zone to maintain the wilderness effect for his campground. Tr. 6. The intended uses of his T&M site were a campground, picnic ground, fishing camp and hunting camp. Tr. 7, Ex. 2. During the prove-up period for the entry from 1965 to 1970, the only time he operated his business was from September to November in 1970. Tr. 7. The major camping season in the area occurs

during June through August. Consequently, he now operates the campground during those times. Tr. 8. He charged users \$1 for picnic use (which usually is not collected) and \$2 for overnight camping. Tr. 9.

Mr. Ward testified that he began work on the one mile road to the campsite in 1965. He finished this improvement in 1970. He also completed nine campsites in August, 1970. He completed all the other improvements sometime in the late summer of 1970. Tr. 12. However, only one-fourth of the access road to the campsite is on the T&M site. Tr. 13. It was necessary to ford a 20-foot wide creek in order to get to six of the campsites. Ex. 3 and 10. A developed campsite would have a picnic table, a trash barrel, a half-barrel fire place and a gravel pad if a pad was needed to make it level. The leveling work required zero to 15 yards of gravel. Tr. 17, 34. Two campsites he had developed were located off the T&M site. Tr. 20. He tore down the log pavilion several weeks after he had constructed it. Tr. 22. It was not on the site in November of 1970.

Mr. Ward stated he did not commence his campground business until June, 1970. Tr. 29. He was issued an Alaskan business license for "real estate including rentals" on June 25, 1970. Ex. 9. According to a ledger sheet prepared by Mr. Ward accounting for the cash received during May to November 1970, he realized campground revenues of \$4 on September 27, \$2 on October 5, \$6 on October 19, \$4 on October 26, \$10 on November 9 and \$14 on November 16, 1970. Ex. 4. The total income for his prove-up period was \$40. Tr. 27. He did not have an office on the site but used a collection box where campers could deposit their fees. Tr. 29. In his view the campground operates itself. Tr. 39.

Stuart Hirsch, a realty specialist for the Bureau of Land Management (BLM) who has degrees in forest recreation and recreation planning, conducted examinations of the T&M site in May and August of 1976. Tr. 42. The purpose of the examinations was to verify the extent of improvements as they were listed on the application to purchase. Tr. 42. Because of a backlog of field examinations, Mr. Hirsch was unable to examine Mr. Ward's site until 1976. Nevertheless, at that time evidence of prior use during Mr. Ward's prove-up period ending in 1970 could still be detected. Tr. 44.

On the first examination in May, 1976, Mr. Hirsch was unable to drive onto the site. Tr. 45. The access road was washed out 200 yards away from the campsite. Tr. 46. He located all the property corners that had been placed by the BLM cadastral surveyors. Mr. Hirsch could not examine the entire T&M site because the creek had overflowed and the main portion of the campground was under two feet of ice and water. Tr. 47. At that time, he identified several campsites where the access road intersects Tolsona Creek. Exs. A and Ex. 10, #3, Tr. 55.

The contestant's realty specialist crossed Tolsona Creek at the access road intersection and found four campsites and an access loop. Ex. A (Campsites 17-20). He found no evidence that those sites had been used. Tr. 56. In order to determine whether campsites appeared to have been used, he examined each one for signs of disturbance of vegetation around the picnic area, evidence of litter and trails between the campsites. When asked which campsites he felt were present at the end of Mr. Ward's prove-up period Mr. Hirsch responded:

"* * * I asked Mr. Ward specifically in May and in August of 1976 which improvements existed at the end of his prove-up period. Mr. Ward indicated that the camping loop with campsites 17 through 20 did not exist in 1970. He also indicated that the wilderness camping area with campsites 30, 32, up to 46 did not exist in 1970. On my map #4, the area shaded in green is the area that Mr. Ward claimed to be his most popular drive-in campsites and those campsites can be found with numbers 5, 21, 22, 6, 23, 7, 24, 8, and 25." Tr. 57, 58.

Mr. Hirsch concluded that campsites 5, 6, 7 and 8 existed in 1970. Tr. 58. The other five out of nine 1970 campsites would have been located on the east side of Tolsona Creek. Two of them would be on the homestead, (campsites 10 and 12 on Ex. A). Campsites 1, 2 and 3 are the remaining original campsites. Tr. 58. After his 1976 field examinations, Mr. Hirsch determined that only campsites 1, 2, 3, 10 and 12 evidenced any camping use. However, he could not estimate when these campsites were used. Tr. 60. The only area that Mr. Hirsch felt had sufficient use to qualify for patent is a tract of less than one acre near campsites 1, 2 and 3. Tr. 63. In spite of this finding he concluded that Mr. Ward was not engaged in a business at the end of his prove-up period, because the period of operation was so short and the receipts were so low. Tr. 63. Consequently, he did not recommend issuance of a patent for this area. Tr. 64.

There is an Alaska State operated campground on Tolsona Creek a hundred yards down the Glenn Highway near Mr. Ward's camping facility. Tr. 64. According to Mr. Hirsch, most sites which are used for camping in the area are completely undeveloped. Most of the campers use vacant gravel pits in unimproved areas. Tr. 64.

Several enlarged aerial photos of the T&M site were introduced into evidence. Ex. 14 and 15. Both photos were taken in 1971. Tr. 65. Although some small trails near Tolsona Creek are visible on Ex. 14, Mr. Hirsch testified that virtually none of the improvements alleged to have been made by Mr. Ward are visible. Several natural clearings appear along the creek but there are no indications of hand-made clearings for campsites. Tr. 67. He also

detected 100 feet of graveled road, a 200-foot long cat trail and some sections of a foot trail. Tr. 69. On the other hand, a 1976 aerial photo of the site reveals a considerable amount of development that had taken place since 1971. Tr. 67.

On cross-examination Mr. Hirsch said that he moved to Alaska in 1975. Tr. 69. He further stated that "break-up," when the snow and ice melt and the creeks open, occurs in the Glennallen area in the middle of April. On the May 28, 1976 examination, the area was muddy and there was a considerable amount of ice and snow on the river. Tr. 70, Ex. 11, #1. During the month of August, the area is dry and the creek has receded. Tr. 73. Mr. Hirsch asserted that he walked over all the areas where Mr. Ward claimed to have made improvements. Tr. 89.

In Mr. Hirsch's opinion there was very little camping use of the site prior to the end of the prove-up period because the aerial photos show that there was virtually no access road on the T&M site. Tr. 92. He also concluded that there were only four campsites at that time, located southeast of Tolsona Creek between the creek and the homestead. Tr. 93. Only one of the outhouses was on the site. Tr. 94.

Mr. Ward was recalled as a witness. His father homesteaded the land adjacent to the T&M site in 1963. Over the years, Mr. Ward saw extensive use of the State campground down the highway. Since it was full at times, he believed he could develop a campground near the homestead. In 1965, he began clearing the area. However, his project was cut short when he left to teach school in Turkey. The next year he taught in England and the following year in Texas. Although he returned to continue the campground venture when he was not teaching, he realized he would not be able to complete it in a year or two as originally planned. In the summer of 1969 he returned to make another attempt at developing the site. He purchased a backhoe in 1970 and completed his access road. Tr. 98.

According to a map of the T&M site prepared by the contestee, campsites 1 through 9 were constructed on the site in 1970. He testified that an access road and loop plus walking trails were also developed in 1970. Ex. A. Tr. 99-102. Although campsite 9 was constructed in 1970, it was situated north of Tolsona Creek and there was no bridge or road providing access to it. Mr. Ward stated you would have to walk to the campsite. Tr. 100. He further asserted it was easy to ford the creek near campsite 2, but he didn't have many campers over there. Tr. 102. A document relating to a sale of a backhoe listed a price of \$4,000. Ex. B. A dump truck was purchased for \$1700. Ex. C. A total obligation of \$585.50 for Caterpillar work time in 1970 was also incurred. Tr. 103, Ex. D, E, F. However, most of this Caterpillar time was on the homestead. Tr. 104.

Mr. Ward believed he was going to have at least 50% occupancy of his campgrounds when he opened for business. He saw the State campground on the other side of the highway full on frequent occasions. Tr. 106. That campground is a short loop with five or six campsites. Tr. 107.

Mr. Ward stated the moss and thick vegetative cover on his campsites pack down and would not be seriously affected by use during an entire summer period. Tr. 116. Oil or gasoline leakage from the campers would not leave visible residue. Tr. 117. He also believes that the absence of signs of vandalism or abuse on trees and tables near the campsites does not indicate a lack of use. Tr. 119. Mr. Ward testified all of the campground is in a flood plain. He challenged the value of the aerial photographs submitted by the Government. He contended the large trees on the T&M site concealed many of his improvements. Tr. 122. When asked how he constructed a walking trail on the T&M site, Mr. Ward responded:

"Walking through with a chain saw and if there's -- at numerous times there are trees across the trail. You just cut two -- make two cuts and throw the bark out of the way. If there's a tree leaning up, run the chain saw down the side of the tree to knock off all the little limbs."

* * * *

"* * * If there was an animal trail or a fisherman's trail, I would have used that. Whenever I came to a natural trail going through, I'm sure I would have followed that trail as I went along. * * *" Tr. 123.

He added that the Tolsona Creek can be expected to flood once every two years, but the area is usable in the summer months even though it is in a flood plain. When the creek overflows, the road is washed out and silt settles over the area. Tr. 124. His explanation for not personally operating the campground in 1970 was, "There was not enough business back there at the time for me to stay there and continually [wait for] the campers to come in." Fifty percent of his customers are from Alaska and the others are "from outside." Tr. 125.

On cross-examination, Mr. Ward conceded he was out of Alaska four out of five winters and two out of five summers during the prove-up period. Tr. 148. He acknowledged also that more campers used the campsites close to the road which did not require them to ford the creek. Tr. 149. The total income in 1970 from the campgrounds, \$40, includes sums received for use of campsites that are on the homestead next to the T&M site. Estimated costs for improvements were \$2,000 excluding the cost of the backhoe and dumptruck. Tr. 149-150. From 1975 to 1978, substantial improvements were made on the site. Tr. 154. However, Mr. Ward acknowledged that he has not recouped his total investment. Mr. Ward states, "Haven't made a profit over the life of the campground. Not at all, no." Tr. 155.

Hugh Risley, a resident of Glennallen, Alaska, was called as a witness by the contestee. He is familiar with the Tolsona Creek recreation area. Tr. 160. He has walked and fished along the creek area since 1958. He stated there was a road on the site in 1970 and that it extended to the vicinity of campsite #9. Tr. 163, Ex. A. He also saw some campsites at that time. Campers used part of the area before 1970. Tr. 166.

Brian Linscomb, the contestee's nephew, was on the T&M site for the first time in May, 1975. He asserted that Ex. 11, photo 11 is a photo of campsite #6 and photo 9 is campsite #17. Tr. 172. He disagreed with Mr. Hirsch's opinion that vegetative disturbance is a good sign of camping use. Tr. 174.

Mr. Hirsch was recalled and insisted that Ex. 11, photo 11 is a picture of campsite #3. Tr. 177. He also stated it would take heavy use (two or three times a week over a period of several months) before the vegetative cover on a campsite would disappear. Tr. 179.

Applicable Law

An applicant seeking to purchase a trade and manufacturing site has the burden of proving that he has complied with the requirements of the law. 43 U.S.C. § 687(a)(1970). A trade and manufacturing site application is properly rejected when there are only some roads and clearing for a campground and use of the land for campsite rentals has been intermittent; only a few people used the campsites during the life of the claim; and any revenues which were derived or could have been derived from use of the site as a campground would not be such as to engender the belief that the applicant was engaged in a productive industry or that he hopes to garner a profit from operation of a business. United States v. Ronald B. Tippetts 29 IBLA 348 (1977), United States v. Jerry L. Crow 28 IBLA 345 (1977).

The Department has interpreted the T&M site law to require an applicant to show at the time his application to purchase is filed that he is presently occupying land for business purposes, that the land contains improvements and that it is presently needed for conduct of the existing business. It is clear that a site for a prospective business cannot be acquired under the T&M site law. 43 CFR 2562.3(d)(1). United States v. Jerry L. Crow *supra* at 349.

An applicant wishing to purchase a tract must submit evidence from which it can be concluded that he was engaged in actual business operations from which he reasonably hoped to derive a profit. E.g. Thelma S. Butcher, 7 IBLA 48 (1972). This does not mean that a modest operation or even an unprofitable one would necessarily fail to qualify, but there should be evidence of activity of such a nature that a reasonable return could be expected. United States v. Ronald B. Tippetts, 29 IBLA 348 (1977). Where the evidence shows that as of the final day of the 5-year statutory period

for proving up a T&M site a claimant's business on the site was only prospectively viable, the concept of substantial compliance may not properly be invoked to bring the claimant within the bounds of the legal requirement for proving up such a site. United States v. Barbara Jean Hill, 33 IBLA 395, 400 (1978).

Reliance upon erroneous or incomplete information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law. Juan Munoz 39 IBLA 72 (1979); W.R. and Margaret W. Collier 39 IBLA 81 (1979). Action taken by the BLM after the expiration date of the entry could not prejudice the contestee when the evidence shows his failure to meet the prove-up requirements during the statutory period.

Analysis

On the basis of the evidence in this contest I conclude that the applicant has failed to submit sufficient proof to qualify for a patent to the T&M site. An examination of the record reveals that by the end of the proveup period the applicant had constructed a short stretch of road, leveled out some of the original nine campsites, and cut a foot trail through a forested area. The facilities placed for use by campers were such items as half-barrel fire containers and used cable spools for tables. Such relatively minor efforts at development are not sufficient to establish a right to purchase a T&M site. Evelyn M. Bunch 25 IBLA 44, 47 (1976); Kenai Power Corporation, 2 IBLA 57 (1971).

The case record establishes that the applicant's purported campground operations could not be regarded as a prospectively viable business. At the conclusion of the applicant's prove-up period total revenues from his campground were \$40. Only 20 campers used the area. Part of the 1970 receipts were for campsites not located on the T&M site. Most of the T&M site was inaccessible in the spring of 1970 due to the presence of ice and snow. The site is in a flood plain and according to Mr. Ward Tolsona Creek overflows every two years, which can cause substantial damage to the campground. Furthermore, Mr. Ward merely allows the campground to "operate itself." It is in competition with vacant gravel pits and a state operated campground in the area. Even taking into consideration the revenues from the campsite after the prove-up period, Mr. Ward admits he has not made a profit over the life of the facility. Based upon such negative economic factors, and the limited time the campgrounds can be open it cannot be concluded that there was a reasonable expectation that a profit could have been realized.

A lengthy discussion of Mr. Ward's arguments concerning notice and estoppel would serve no purpose. Any statements made by the BLM in 1976 after the prove-up period have no binding effect. No purpose will be served by a review of the issue of good faith.

Conclusion

Placing inexpensive and moveable items upon leveled or naturally flat sites during the last six months of the prove-up period did not provide sufficient time or opportunity for a test of the contestee's belief that he could make a small profit from a wilderness campground. It is conceivable that most or all of the \$40 in campers' fees for 1970 came from use of the campsites situated on the homestead. Certainly there is no proof that any requirement for new campsites in 1970 could not have been met by the addition of two or three more. Only on two days in 1970, November 9 and November 16, did receipts exceed six dollars (that amount would indicate the utilization of three campsites in one day). Indeed, if one goes beyond the prove-up period into 1971 and 1972, the receipts from the campsites averaged only about \$26 per month, assuming a total annual camping period of six months. A return in that range would not pay a reasonable wage for devoting an hour every other day to collect receipts from the box on the site, check the campsites and perform cleanup work.

Because of a general increase in tourism in Alaska, additional traffic on the Glenn Highway and the North Slope oil discovery, Mr. Ward anticipated that a profitable campground business could be established. It is obvious that his expectations were unrealistic.

The applicant has not sustained his burden of proof in this proceeding. Use or occupancy for the purposes set forth in the trade and manufacturing site statute was insubstantial. I find that he attempted to acquire the site for a prospective business. Since the contestant has prevailed with respect to the first two charges in the complaint, Mr. Ward's application to purchase is rejected. The entry which is the subject of this contest is hereby cancelled.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1977). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations

